

## APPEAL NO. 002548

Following a contested case hearing held on September 28, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the Texas Workers' Compensation Commission (Commission) abused its discretion in approving Dr. H as an alternate treating doctor and that the appellant (claimant) did not have disability from April 27, 2000, through July 11, 2000. The claimant's request for review, in essence, challenges the sufficiency of the evidence to support these determinations. The respondent (carrier) urges in response that the evidence is sufficient to affirm the decision.

### DECISION

Affirmed.

The parties stipulated that on \_\_\_\_\_ (all dates are in 2000 unless otherwise stated), the claimant was the employee of (employer) and sustained a compensable injury. The claimant, who had worked for the employer as a machinist/carpenter making custom furniture for about two and one-half years, testified that on February 12 three left hand fingers were crushed between a two-by-four and a heavy wood fireplace mantle; that the injury was treated at an emergency room; that he commenced treatment with Dr. V, a hand surgery specialist, on February 15; and that on April 6 he underwent surgery to graft skin onto the middle finger. Dr. V's April 6 operative report reflects that he performed a skin graft on the long finger, removed the ring and index finger fingernails, and debrided the nail beds. The claimant further stated that he is right hand dominant; that Dr. V, who had taken him off work for approximately two months, released him for work with no restrictions on April 18; that he returned to work for about three days, including April 24, but did not work full-time nor clock in and out; that on April 24 he was required to unload plywood from a truck and his left hand hurt and no one would help him; and that he "knew [he] had to go get a second opinion and get some rehabilitation on [his] hand." The claimant said that April 24 was the last day he worked for the employer; that he returned to the employer sometime after having been released by Dr. H on June 18 but his position had been filled; that he has been drawing unemployment benefits; and that he is soon to commence new employment.

The claimant further testified that Dr. V "just operated on [his] hand and sent [him] back to work" with an April 18 release; that he did not return to Dr. V after that date and began treating with Dr. H on April 28; and that Dr. H started some rehabilitation to "loosen up" his hand. The claimant said that Dr. H's treatment fixed his hand.

Mr. K, the employer's production manager, testified that on April 24, he and the claimant worked side-by-side installing a heavy, bulky wood fireplace mantle at a country club; that the claimant had a bandage on the top part of his left middle finger; that the claimant lifted and carried objects, used a saw and other hand tools, and that he had no apparent difficulty using his left hand nor did he make any complaints about it. He said that

on the following two days, the claimant worked on the fabrication of a large kiosk for a shopping center, again with no apparent difficulty or complaints about his left hand, and that he indicated he was eager to get back to work on a major project, having declined lighter work. Mr. K indicated that the claimant simply failed to return to work after April 24 although from time to time he would stop by the office and talk to Ms. F, the employer's secretary, and that he, Mr. K, saw the claimant at the shop on a couple of weekends to pick up various tools which belonged to him. He further stated that on June 30 the claimant said he had a release to return to work and would return to work on July 3, but that he failed to show up; and that when he did come in on July 11 with a release, his position had, of necessity, been filled.

Ms. F testified that on April 24 the claimant had a bandage on one finger but moved it "pretty well" and flexed his left hand to show her how much his range of motion (ROM) had improved. She said that when she asked him why he did not clock in, he stated that he was "going to get a second opinion on his hand and needed to be able to come and go as he pleased." She said that when he returned to work the next day, the claimant told her that he had seen a second doctor who, like Dr. V, told him that he should start working, and that he was going to get still another opinion from a third doctor. She also stated that she learned from the adjuster that the claimant had been taken off work by another doctor. Ms. F also said that on June 9 she saw the claimant, who drove his motorcycle to and from the employer's location, take a ladder from the shop, and that he explained to her that he needed it to check on a leak at his house. She said that on June 9, the claimant showed her his hand, which looked fine, flexed it to demonstrate his ROM, and told her he would obtain a release on June 30 with an effective return to work date of July 3 but that he did not come to work on July 3 nor did he call in.

Mr. S, the employer's warehouse supervisor, testified that on June 24 the claimant came to the shop and sawed a board into smaller pieces. He said that the claimant told him he had just laid a hardwood floor in a bedroom and needed to make the trim molding. He also said that the claimant manifested no apparent problem working on the kiosk during the week of April 24. In rebuttal, the claimant testified that he told Mr. S the floor was already installed and that he just needed to make the trip to cover the gap between the floor and the walls.

Dr. H's June 3 record apparently reflects some restriction in the flexion and extension range of the middle finger, though the motor function and muscle testing strength of the three affected fingers were reported as within normal limits. Dr. H's May 4 Texas Workers' Compensation Work Status Report (TWCC-73) states that the claimant is restricted from all work as of May 3 until at least May 15 and that he is to be seen three times a week for physical therapy. The subsequent TWCC-73 forms of Dr. H's in evidence extended the total work restriction to July 24.

The carrier introduced the July 10 investigative report of Mr. P and the videotape of Mr. P's surveillance of the claimant on June 21 and 26. According to the report, the

claimant was observed apparently preparing the exterior of a house to be painted, climbing a ladder, carrying five gallon buckets, using hand tools, and painting wood trim.

In evidence is an Employee's Request to Change Treating Doctors (TWCC-53), signed by the claimant on April 27, which stated the following as his reason for requesting to change treating doctors from Dr. V to Dr. H: "Doctor sent me back to work to [sic] quick hand is not well need a second opinion." The form reflects that an employee of the Commission denied this request for the reason that "a request to change can't be made to procure a new report nor for a second opinion." Also in evidence is the claimant's TWCC-53 signed on May 22 again requesting to change to Dr. H and stating the following reason: "I didn't receive [sic] enough care from previous Dr. I want to get better." This request was approved by a different Commission employee.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. The claimant challenges the hearing officer's finding that his inability to obtain and retain employment at wages equivalent to his preinjury wages from April 27 through July 11 was a result of something other than an injury occurring while the claimant worked for the employer. The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not it so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Section 408.022(b) provides, in part, that "if an employee is dissatisfied with the initial choice of a doctor from the commission's list, the employee may notify the commission and request authority to select an alternate doctor." Section 408.022(c) provides that "the commission shall prescribe criteria to be used by the commission in granting the employee authority to select an alternate doctor." It goes on to states certain criteria which are not exclusive. Section 408.022(d) provides that "a change of doctor may

not be made to secure a new impairment rating or medical report.” See *a/so* Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 126.9 (Rule 126.9) which implements Section 408.022.

The claimant challenges findings that, initially, his reason for requesting an alternate choice of doctor was to secure a new medical report and this request was properly denied, and that on May 22 the Commission abused its discretion in approving his second request to change treating doctors to Dr. H. The Commission has consistently applied an abuse of discretion standard in reviewing requests to change treating doctors. See Texas Workers’ Compensation Commission Appeal No. 941475, decided December 16, 1994. We are satisfied that the hearing officer did not abuse her discretion in reaching the challenged findings. The hearing officer gives the following explanation in her discussion of the evidence: "In the instant case, the Commission approved the second request without reviewing the prior request which was readily available and should have been reviewed. This is a clear abuse of discretion." Our decision in Texas Workers’ Compensation Commission Appeal No. 982207, decided November 2, 1998 (Unpublished), affirmed the decision of a hearing officer who viewed the evidence as showing that the claimant requested to change treating doctors because he disagreed with having been released to return to work by his treating doctor and cites several similar decisions.

The decision and order of the hearing officer are affirmed.

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Philip F. O’Neill  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge